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In the
Supreme Court of the United States

October Term, 1972

No. 72-367

MARK P. ESSLING, a minor, and EDWARD J. ESSLING, a minor, by JAMES ESSLING, their father and natural guardian,

Petitioner,

vs.

RICHARD L. BRUBACHER, Commissioner of Administration of Minnesota,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

Petitioner's citations to the appendix of the opinions in the courts below are listed in reverse order. The opinion of the Court of Appeals for the Eighth Circuit is found at pages 6 and 7 of the appendix. The opinion of the District Court for the District of Minnesota is found at pages 2, 3 and 4 of the appendix.

STATUTORY PROVISIONS INVOLVED

1. VOYAGEURS NATIONAL PARK, MINNESOTA STATUTES, CHAPTER 84B (1971).

In addition to the statutory provisions listed in the petition, the following provisions of the Minnesota statute relating to Voyageurs National Park are involved:

> "[T]he governor . . . shall donate and convey to the United States of America the state's interest in all of the following lands lying within the boundaries of Voyageurs National Park . . .: (1) trust fund lands; (2) lands forfeited to the state for nonpayment of taxes . . .; and (3) other lands acquired or otherwise owned by the state." Minn. Stat. §84B.03(1) (1971).

> "[T]he commissioner of administration shall acquire, by condemnation, fee title to all trust fund lands lying within the boundaries of Voyageurs National Park. . . . Before any parcel of trust fund land is donated to the United States, the commissioner of administration shall certify to the governor that the parcel has been condemned, the condemnation award has been paid, and the time to appeal from the award has expired." Minn. Stat. §84B.03(2) (1971).

> "The commissioner of administration shall also acquire fee title, free from any trust or other encumbrance, to all land lying within the boundaries of Voyageurs National Park, the title to which has vested . . . in the state due to nonpayment of taxes . . . and is held by the state . . . in trust for the respective taxing districts. . . . The commissioner of administration . . . shall appraise the land at its fair market value. Upon determining the value of the land, the commissioner of administration shall transfer to the appropriate county auditor . . . an amount of money equal to the appraised value of the land. . . ." Minn. Stat. §84B.03(3) (1971).

"The commissioner of administration shall acquire, by condemnation or purchase, fee title to lands owned by any political subdivision of the state located within the boundaries of Voyageurs National Park." Minn. Stat. §84B.04 (1971).

"When a tract or lot of privately owned property is acquired by the federal government for inclusion within Voyageurs National Park, and when as a result of the acquisition, taxes are no longer assessed against the tract or lot or any improvements thereon, the following amount is annually appropriated from the general fund to the county of Koochiching or St. Louis for distribution to the taxing districts. . . ." Minn. Stat. §84B.07 (1971).

"For the purposes of providing funds to pay the cost of acquisition of public land in the manner and upon the conditions set forth in sections 84B.03, subdivisions 2 and 3, and 84B.04, including but not limited to the cost of appraisals, court costs, and legal services, the state auditor is authorized . . . to sell and issue bonds of the state . . . in an aggregate amount not to exceed $5,870,000. . . . The proceeds of such bonds . . . are appropriated to the commissioner of administration and shall be . . . used solely for the purpose . . . provided in this section." Minn. Stat. §84 B.08(1) (1971).

"All expenses incidental to the sale, printing, execution, and delivery of bonds pursuant to this section, including but not limited to actual and necessary travel and subsistence expenses of state officer and employees for such purposes, shall be paid from the proceeds of the bonds, and the amounts necessary therefor are appropriated for that purpose." Minn. Stat. §84B.08(3) (1971).

"It is the intent of the legislature that the appropriations made by section 84B.07, as payments to the counties in lieu of taxes, and by section 84B.08, as proceeds from the sale of Voyageurs National Park bonds, shall not exceed $6,000,000 and shall constitute the total expenditures of the state or any state agency for the purposes of sections 84B.01 to 84B.10, notwithstanding any other provisions of law or any appropriation made by law." Minn. Stat. §84B.09 (1971).

2. ADMINISTRATIVE CONTROL OF STATE LANDS, MINNESOTA STATUTES, SECTION 84.027, SUBDIVISION 2 (1971).

The following Minnesota statute relating to administrative control of state lands is also involved:

"The commissioner [of natural resources] shall have charge and control of all the public lands . . . of the state and of the use, sale, leasing, or other disposition thereof . . ." Minn. Stat. §84.027(2) (1971).

3. EMINENT DOMAIN, MINNESOTA STATUTES, CHAPTER 117 (1971).

The following statutory provisions, relating to Minnesota eminent domain (condemnation) proceedings, are also involved:

"All bodies, public or private, who have the right of eminent domain, when exercising such right, shall do so in the manner prescribed by chapter 117, even though a different procedure may be provided by charter provisions, ordinance or statute. . . ." Minn. Stat. §117.011 (1971).

"If such property be required for any authorized

purpose of the state, the proceeding shall be taken in the name of the state by the attorney general upon request of the officer, board, or other body charged by law with the execution of such purpose. . . ." Minn. Stat. §117.035 (1971).

"If the state be an owner, the notice [of hearing on eminent domain petition] shall be served upon the attorney general. . . ." Minn. Stat. §117.055 (1971).

"If the proposed taking shall appear to be necessary and such as is authorized by law, the court by an order shall appoint three disinterested commissioners, and at least two alternates, residents of the county, to ascertain and report the amount of damages that will be sustained by the several owners on account of such taking. . . ." Minn. Stat. §117.075 (1971).

"Without unreasonable delay they shall make a separate assessment and award of the damages which in their judgment will result to each of the owners of the land by reason of such taking and report the same to the court. . . ." Minn. Stat. §117.085 (1971).

"At any time within 40 days from the date that the report has been filed, any party to the proceedings may appeal to the district court from any award of damages embraced in the report, or from any omission to award damages. . . ." Minn. Stat. §117.145 (1971).

"All damages allowed under this chapter, whether by the commissioners or upon appeal, shall bear interest from the time of the filing of the commissioner's report or from the date of the petitioner's possession whichever occurs first. If the award is not paid within 70 days after such filing, or, in case of an appeal within 45 days after final judgment, or within 45 days after a stipulation of settlement, the

court, on motion of the owner of the land, shall vacate the award and dismiss the proceedings as against such land. . . ." Minn. Stat. §117.195 (1971).

QUESTION PRESENTED

Does the complaint present a real and substantial federal question by alleging that the defendant intends to violate a federal-state compact by disposing of lands without paying full value therefor, where the applicable state constitutional provisions and statutes expressly require determination of the land value and full payment thereof?

STATEMENT OF THE CASE

The Statement of the Case set forth in the petition is inaccurate in several respects.

1. CONDEMNATION PROCEEDINGS DETERMINE LAND VALUE.

Contrary to the statement at page 5 of the petition, the Minnesota statute relating to Voyageurs National Park (Minn. Stat. §§84B.01-.10 (1971) does *not* predetermine the outcome of the proceedings to condemn the school trust lands and does *not* fix a "specified and absolute dollar limitation on the amount to be paid to the School Trust Fund for the trust lands." The act merely appropriates certain funds for payments to counties in lieu of taxes (§84B.07), for payment to the school trust fund for the value of the trust lands (§§84B.03(2), 84B.08(1)), for payment to the taxing districts for the value of the tax forfeited lands (§§84B.03(3), 84B.08(1)), for payment to political subdivisions for the value of lands owned by them (§§84B.04, 84B.08(1)), for costs of land acquisi-

tion including appraisals, court costs and legal services (§84B.08(1)), and for costs incidental to the sale of the bonds (§84B.08(3)). The act then (§84B.09) states the "intent" of the legislature that the total appropriation for all these purposes shall not exceed $6,000,000.

The determination of the amount to be paid for the school trust lands is governed by the provisions of the statutes relating to eminent domain proceedings. Minn. Stat. §§117.011, 117.075, 117.085, 117.145 (1971). If the value of the lands as determined in those proceedings is not paid within the specified time, the proceedings must be dismissed and title to the lands is not acquired. Minn. Stat. §117.195 (1971).

2. PARTIES TO CONDEMNATION PROCEEDING ARE SPECIFIED.

The implication in the petition at page 5 that the parties to the condemnation proceedings are uncertain is erroneous. The school trust lands are under the administrative control of the commissioner of natural resources. Minn. Stat. §84.027(2) (1971). The eminent domain statutes specify that the proceedings shall be taken in the name of the state by the attorney general upon request of the officer charged with responsibility for the land acquisition, in this case the commissioner of administration. Minn. Stat. §§84B.03(2), 117.035 (1971). When the state is the owner of the lands involved, notice of the proceeding must be served on the attorney general who, in this case, must then provide representation for the commissioner of natural resources. Minn. Stat. §117.055 (1971).

3. ERRONEOUS CONCLUSIONS NOT ADMITTED BY MOTION TO DISMISS.

The statement in the petition at page 6 that the defendant, by his motion to dismiss, admits the allegations of the plaintiff is inaccurate to the extent that the allegations include conclusions of law and unwarranted deductions of fact. Plaintiff's contention that the full value of the lands involved will not be paid to the trust fund is contrary to the express provisions of the applicable statutes. Minn. Stat. §§117.085, 117.195 (1971). That allegation is not admitted for purposes of the motion to dismiss.

4. COURTS BELOW HELD NO SUBSTANTIAL FEDERAL QUESTION INVOLVED.

The United States District Court for the District of Minnesota granted defendant's motion to dismiss for lack of subject matter jurisdiction on the ground that plaintiff had failed to show existence of a real and substantial federal question constituting an essential element of the cause of action. (A. 3).

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed on the basis of the district court's opinion. (A. 7).

ARGUMENT

1. PETITION IGNORES REQUIREMENT FOR REAL AND SUBSTANTIAL FEDERAL QUESTION.

The reasons relied on for the allowance of the writ of certiorari are 1) that the decision of the court of appeals is in conflict with the decisions of other courts of appeal on the same matters, and 2) that the decision of the court of

appeals is in conflict with applicable decisions of the Supreme Court.

None of the decisions cited in the petition is in conflict with the decision of the court of appeals in this case. Petitioner's argument misinterprets the holding of the court of appeals and ignores the fact that the decisions of the district court and the court of appeals were based on the absence of a "real and substantial" federal question. (A. 3, 7). There are no holdings by the courts below on the significance of the federal-state compact, on federal protection of school land trusts, or on the determination of just compensation in eminent domain proceedings. No holdings on these questions were necessary because it is apparent that the claim set forth in the complaint is without substance.

2. STATE LAW DOES NOT PERMIT DIVERSION OF SCHOOL LANDS.

Petitioner's argument that school lands may not be diverted to other purposes without compensation to the trust fund, and the cases cited in support thereof (Pet. 8, 9), are irrelevant to this case. While the complaint alleges that the school lands involved will be condemned and donated to the United States without payment of their full value to the trust fund, that allegation is not admitted for purposes of the motion to dismiss because it is an erroneous conclusion of law. *Ward v. Hudnell,* 336 F. 2d 247 (5th Cir. 1966); *2A Moore's Federal Practice,* par. 12.08, n. 4. The plain language of the state law conclusively establishes that fee title to the lands cannot be acquired without payment of full value and further conclusively establishes that the land cannot be donated to the United

States until the full value has been paid. The state law requires acquisition of fee title to the lands by condemnation. Minn. Stat. §84B.03(2) (1971). In the condemnation proceedings, commissioners are appointed by the court to determine the value of the lands taken. Minn. Stat. §117.075 (1971). If the condemnation award is not paid within a specified time, the condemnation proceedings must be dismissed on motion of the owner of the lands involved. Minn. Stat. §117.195 (1971). Before any parcel of the land is donated to the United States, the commissioner of administration must "certify to the governor that the parcel has been condemned, the condemnation award has been paid and the time to appeal from the award has expired." Minn. Stat. §84B.03(2) (1971).

3. LAND VALUE IS NOT PREDETERMINED BY THE STATUTE.

Petitioner erroneously asserts that the state law fixes a specific maximum to be paid for the school trust lands. The state law merely appropriates funds for numerous purposes, including payment to the trust fund, and states the intent of the legislature that the total state expenditures for all these purposes shall not exceed a stated amount. Minn. Stat. §§84B.07, 84B.08(1), (3), 84B.09 (1971). Nowhere does the law specify the amount to be paid for the school lands.

In essence, petitioner argues that the state law is invalid because the appropriation of funds is not unlimited and the appropriation may prove inadequate. None of the cases relied upon supports this contention. *Rockaway Pacific Corporation v. Stotesbury*, 225 F. 345 (N.D. N.Y. 1917), (Pet. 10), did not turn on the question of inadequate ap-

propriation. Rather, the court expressly declined to state an opinion as to the value of the lands involved, and stated that the value would be determined in the condemnation proceedings "unaffected in any way by the amount of the sum appropriated by the Legislature". 255 F. at 351. The condemnation statute in that case provided that title to the lands would vest in the state upon completion of certain formalities. The state argued that no appropriation of funds was necessary prior to taking title, and the court held that an appropriation must be made.

Monongahela Navigation Co. v. United States, 148 U. S. 312 (1893), (Pet. 10), merely held that the provision in the statute that certain property rights not be considered in determining value was invalid and must be ignored by the courts in the condemnation proceeding.

Keystone Associates v. Moerdler, 19 N.Y.2d 78, 224 N. E. 2d 700 (1966), (Pet. 10), involved the creation by the legislature of a private corporation vested with power to condemn the Metropolitan Opera House in New York City. The legislation provided for a 180 day delay in the demolition of the building upon deposit of $200,000 as security for damages to the owner. It was intended that the corporation would attempt to raise private funds during this period for the purpose of acquiring the building by condemnation. The court pointed out the doubtfulness of the venture and held that the land owner could not be "relegated to the doubtful responsibility or solvency of a private corporation or an individual". 224 N.E. 2d 700, 703.

State v. McCook, 109 Conn. 621, 147 A. 126 (1929) and *Godfrey v. District Court,* 44 Minn. 299, 46 N.W. 355 (1890), (Pet. 10, 11) both held that adequate condemnation procedures must be established which assure that once

title is taken compensation in full will be made. Neither supports the contention that the mere allegation that the amount of funds appropriated will be inadequate renders the condemnation invalid. In *McCook* it was conceded by all parties that the appropriation exceeded the value of the lands. 147 A. at 129.

Only completion of the condemnation proceedings can determine whether the appropriation is adequate. The condemnation procedure in Minnesota clearly provides full protection for the school trust fund by requiring dismissal of the proceedings if the condemnation award is not paid. Minn. Stat. §117.195 (1971). If the appropriations are inadequate to pay the award, fee title to the lands cannot be acquired and the lands cannot be donated to the United States. Minn. Stat. §84B.03(2) (1971).

4. BARE ALLEGATION OF FEDERAL QUESTION DOES NOT ESTABLISH FEDERAL JURISDICTION.

Jurisdiction of a federal court must be made to appear affirmatively. *Scroggin Farm Corp. v. McFdden,* 165 F. 2d 10 (8th Cir. 1948). Where the jurisdiction is challenged, the plaintiff has the burden of establishing jurisdiction. *Gibbs v. Buck,* 307 U.S. 66 (1939).

It is well settled that the mere averment of the existence of a federal question does not give rise to federal jurisdiction. *Newburyport Water Co. v. Newburyport,* 193 U.S. 561 (1904). The question must be real and substantial, and a genuine controversy must exist. *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 277 (1937). Where the alleged claim is wholly insubstantial and frivolous, the action must be dismissed. *Bell v. Hood,* 327 U.S. 678 (1946).

The bare allegation in the complaint that the lands in-

volved will be acquired and donated to the United States without payment of full value is patently without substance and forms no basis for federal jurisdiction.

In addition to the existence of a genuine controversy, federal jurisdiction requires a showing of a substantive claim which will be sustained under one construction and defeated under another construction of the Constitution or laws of the United States. *Wheeldin v. Wheeler,* 373 U.S. 647 (1963). The complaint in this case makes out no such claim. There is no showing of any substantive right in petitioner which was created by federal law. The bare allegation that the lands involved were granted for the use of schools and that the action is brought on behalf of school students falls short of alleging any substantive right in the students.

Even if it were assumed that the complaint made out a sufficient allegation of a right in the students, it is clear that any such right must have arisen under state law rather than federal law. The federal law relied upon merely grants the lands to the state "for the use of schools." *11 U.S. Stat.* 166 (1857), (A. 9). This limitation on the use of the lands was fully satisfied by the provisions of the Minnesota Constitution applying the proceeds of the lands to school purposes. *Minn. Const.* art. 8, §2 (1857), (A. 10).

Any rights as to the use of the lands clearly arise under the state constitution and laws, and such rights would be identical even in the absence of the federal law which prompted adoption of the state constitutional provision. Any question of federal law in this case is merely incidental, is not an integral part or essential element of the case, and does not supply the basis for jurisdiction of

a federal court. *Shulthis v. McDougal,* 225 U.S. 561 (1912); *Stanturf v. Sipes,* 335 F. 2d 224 (8th Cir. 1964), *cert. denied,* 379 U.S. 977 (1965).

5. PETITIONER'S AUTHORITIES DISTINGUISHED.

Petitioner relies on *Lassen v. Arizona,* 385 U.S. 458 (1967), (Pet. 11). That case was commenced in the Arizona Supreme Court and is not authority on the question of federal jurisdiction. *Lassen* is significant, however, in its approval of the acquisition by one state agency of trust lands administered by another state agency by simply paying the appraised value, despite detailed restrictions in the federal act granting the lands. As in *Lassen,* two state agencies are involved in the acquisition of the lands in Minnesota. The lands are under the jurisdiction of the commissioner of natural resources and are to be acquired by the commissioner of administration. Minn. Stat. §§84.027(2), 84B.03(2) (1971).

None of the other cases relied upon by petitioner provide authority for federal jurisdiction in this case. *Bell v. Hood, supra* (Pet. 7, 11), clearly requires presence of a substantial claim. *Fair v. Kohler Die & Specialty Co.,* 228 U.S. 22 (1913), (Pet. 7, 11), involved a claim under the patent laws which create specific legal rights under federal law. *Smith v. Kansas City Title and Trust,* 225 U.S. 180 (1921), (Pet. 7), involved the constitutionality of a federal statute and makes it clear that the federal claim must be more than merely colorable and must rest on a reasonable foundation. 225 U.S. at 199.

McGoon v. Northern Pacific Railway Co., 204 F. 998 (D.N.D. 1913), (Pet. 7), was a case relating to rights created by the Interstate Commerce Act. The court clearly

pointed out that federal jurisdiction is not established by a showing of only remote or indirect dependence on federal law since such a case does not turn upon a construction of federal law. *Tunstall v. Brotherhood of Locomotive Firemen,* 323 U.S. 210 (1944), (Pet. 11), likewise related to rights under the Interstate Commerce Act. *J. I. Case Company v. Borak,* 377 U.S. 426 (1944), (Pet. 11), related to alleged violations of provisions the Securities Exchange Act which were designed specifically to protect investors. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), (Pet. 11), involved individual rights protected by the Constitution of the United States.

CONCLUSION

Respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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